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No. 85-2169

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SUPREME COURT OF THE UNITED STATES
IN THE UNITED STATES COURT OF APPEALS

OCTOBER TERM, 1985

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ST. FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH, and DAVID McMAHON, individually and in their official capacities.

Petitioners

vs.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent

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# Brief in Opposition to Petition for a Writ of Certiorari To the United States Court of Appeals for the Third Circuit

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August, 1986

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## COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Is an Arab, Middle Eastern Caucasian who has darker skin color than typical white Caucasians protected against discrimination under 42 U.S.C. 1981?

2. If Plaintiff has justifiably relied on clear past precedent, the rule of Wilson vs. Garcia will not apply retroactively to shorten the 1981 Statute of Limitations.

3. If individual members of a college tenure committee discriminate against Plaintiff because of his dark skin color and Iraqi national origin, can they not be held individually liable for discrimination?

4. Are college tenure committee members permitted to discriminatorily deny tenure, and then refuse to disclose their rationale for so doing as "confidential and privileged from discovery" in a subsequent employment discrimination in Federal Court?

5. If a white European Caucasian is appointed to a job which a darker Mid-East Caucasian had sought, does this fact operate as an absolute defense against a charge of employment discrimination since the Middle East Caucasian Plaintiff is unable to prove that he was replaced by a non-Caucasian?

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COUNTER STATEMENT OF THE CASE:

Plaintiff Dr. Majid Al Khazraji Allan, is a Ph.D sociologist born in Iraq, of Arab ancestry, who practices the Muslim religion (7a). Although he, as an Arab, is of the "Caucasian" race, he is of a different branch of the race and has a darker skin color than those of the white race customarily referred to as Caucasian. (204a). For six years, he served on the faculty of St. Francis College under written annual employment contracts (12a) and was qualified for tenure according to College guidelines. (17a - 18a). He applied for, and was denied recommendation for tenure by the Tenure Committee of St. Francis College on February 10, 1978, (15a), but was never told why he was denied tenure, or given any reasons for this decision. (16a)

Plaintiff received a terminal contract of employment under which his last day of work was May 20, 1979. (205a). (207a). Plaintiff contacted the Pennsylvania Human Relations Commission (hereinafter, "PaHRC") by telephone on September 14, 18 and 25, 1978.(206a) He submitted a letter and written documents in support of his claim of discrimination October 5, 1978.[1] (202a,206a). He was advised telephonically by Commission representatives on 17 occasions that as he would be employed through May 25, 1979 at St. Francis College, the PaHRC could not and would not accept his charge of discrimination "until he had worked his last day." (App. 203, 207).

Following PHRC's advice, Plaintiff filed his charge and the Commission docketed it, on June 22, 1979, (222a)

within 26 days of May 26, 1979, his last day of work. This charge was dual filed with EEOC this same date (App. 44a).

On May 10, 1979 Plaintiff secured a lawyer, (207a) who filed a breach of contract suit in State court. (185a.)

The PHRC dismissed his complaint May 25, 1980 for lack of subject matter jurisdiction due to untimely filing (under Ricks vs. Delaware State Teachers College, even though PHRC itself had refused to process the complaint based on its own erroneous reading of Ricks) and because Plaintiff had filed a State Court breach of contract suit on the same grievance.

Plaintiff filed suit in federal district court alleging violation of his civil rights on October 30, 1980, pro se, within the 90 day limit set forth in the right to sue letter. (226a).

On March 12, 1985, the federal district court granted summary judgment on the remaining federal claims under 42 U.S.C 1981&83, and dismissed the pendent claims. (app. 229a). Plaintiff appealed from the dismissal of the 1981 claim, and from the interlocutory orders, now appealable, denying discovery and dismissing title VII claims.

REASONS FOR NOT GRANTING THE WRIT

I. The decision of the Third Circuit applying 42 U.S.C. Section 1981 to an Iraqi Arab, who is of darker skin color than European white Caucasians is a decision clearly within the scope of Section 1981. There is no conflict with decisions of any other circuit.....

Plaintiff, an Arab of darker skin color than those customarily referred to as white, alleges denial of tenure in a discriminatory manner as compared to whites who received tenure. The district court considered only the allegations of the 1st Amended Complaint in its opinion granting the Motion for Summary Judgment. The court notes that Section 1981 applies to "racial and alienage discrimination", and Plaintiff's amended Complaint I only alleges national origin and religion. However, the Plaintiff's 1st complaint pro se

alleges, at Paragraph 7, "...said unlawful employment policy and practice consisted of refusing to renew the full-time faculty appointment of Plaintiff because of national origin, religion and or race..." The second amended complaint (pro se), at Paragraph 7, also alleges ..."depriving him of his Civil Rights....because of his national origin (Iraq), religion (Muslim) and/or race (Arabian).

Plaintiff's Complaints herein filed, his affidavit in opposition to Summary Judgment, and his deposition testimony all set forth his belief that he was discriminated against because of his national origin/religion/race: He was an Arab, a Caucasian of darker skin color than those Caucasians customarily referred to as white. Under section

1981, the issue is whether he was accorded treatment "...different from white citizens...".as the specific language provides, "All citizens of the United States shall have the same right to make and enforce contracts,...as is enjoyed by white citizens... The Civil Rights Act of 1866, 42 U.S.C. 1981.

The EEOC Government Wide Standards on Race and Ethnic Calegories recognize 4 "branches" of the Caucasian (white) race: Hispanic, European, North African and Middle Eastern.(42 F.R. 17,900 <1977>) As one authority has stated:

> "Individuals who have physical characteristics (particularly, color) that distinguish them from "whites" can pursue claims or racial discrimination under Section 1981, although they might technically be Caucasian in an

> anthropological or sociological sense..Mexican Americans and other Hispanics may thus state a cuase of action under 1981 for racial discrimination. The same rationale would apply with at least as much force to Orientals, native Americans, Indians and other arguably nonwhite groups.
>
> B. SCHLEI & P. GROSSMAN, Employment Discrimination 677, (2nd Ed. 1980)

Courts have had difficulty determining whether a claim of discrimination by certain minorities are ones covered by section 1981. It seems that if a Plaintiff alleges that he is of a different color, although defining himself as of the Caucasian race, that he will be allowed to proceed under 1981. If a plaintiff does not allege race, but only national origin, 1981 will be held not to apply, even though a national origin of Arab, Hispanic, North African, or Middle Eastern most likely

implies a darker skin color than white. Thus, the ability to enforce one's il rights under 1981 turns on a requirement that one be anthropologically-precise in pleadings.

See Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W. D. PA. 1977), disallowing claim by a Slav for race discrimination; Manzanares v. Safeway Stores, 593 F.2d 968,971 (10th Cir. 1979), allowing claim by a Hispanic Caucasian Mexican-American; Petrone v. City of Reading, 541 F. Supp. 735 (E.D. Pa. 1982) ,denying 1981 protection to a white Italian.

Courts have generally allowed Section 1981 claims alleging discrimination against Mexicans or Puerto Ricans, despite objections that they are

actually Hispanic "Caucasians": Sabala v. Western Gillette, Inc., 516 F.2d 1251, (5th Cir. 1975), Sanchez v. Trans World Airlines, Inc., 499 F.2d 1107, (10th Cir. 1974). Gonzalez v. Stanford Applied Engineering, 597 F. 2d 1298 (9th Cir. 1979) (Mexican); Ortiz v. Bank of America, 547 F. Supp. 550 (N.D. Cal. 1983) (Puerto Rican).

If Hispanic caucasians, who are by EEOC definition members of the 'white' race, are covered under section 1981, then why is a Middle Eastern (Arab) Caucasian not entitled to the same protection? In this case, the district court relied on Ibrahim v. N.Y. Dept. of Health, 581 F. Supp. 228 (E.D. N.Y. 1984) for the proposition that an Arab Plaintiff had not stated a viable

1981 claim. The Ibrahim court did not rationalize its decision in light of the EEOC's characterization of the four subgroups of the Caucasian race, nor set forth with specificity whether the pleadings and affidavits in Ibrahim raised the factual issue of differential treatment because of Plaintiff's having a darker skin color than those customarily referred to as white , as Plaintiff here has done. Nor can it be learned from Ibrahim whether the court knew that Ibrahim was a dark-skinned Midlle Eastern Caucasian , or whether Plaintiff had merely alleged Arabic national origin. The teaching of Ibrahim must be rejected as differentiated on the facts, and as not representative of the careful analysis that a court must give before dismissing a 1981 claim.

Petitioner claims that the 3rd Circuit's hold in this case conflicts with a decision of the 4th circuit. Petitioner St. Francis relies upon Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (5th Cir. 1986) for the proposition that since members of the Jewish faith have no protection under 1981, neither should ethnic Arabs. Shaare Tefila differs materially in its facts: Plaintiffs there, members of the Jewish faith, suffered violence directed at them by a Neo-Nazi group. Plaintiffs sued under Section 1982, claiming that since the Neo-Nazis group subjectively perceived Jews as racially inferior, the group's "racially"-motivated desecration of Plaintiff's synagogue formed the bases for 1981 and 1982 suits.

The district court in Shaare Tefila dismissed Plaintiff's claims holding that desecration of a synagogue did not constitute race discrimination. Plaintiff did not allege a status as "different from the white race" or of "darker skin color" in Shaare Tefila.

The critical difference between Sharre Tefila and the instant case, is that Shaare Tefila white plaintiffs sought to maintain their action because they were treated differently "from those of the white race" by a white Neo-Nazi group who subjectively perceived all Jews to be of an inferior race. The decision of the Third Circuit as to the 1981 claim was proper.

II. The decision of the Third Circuit not to apply the rule of Wilson v. Garcia retroactively is in full accord with this Court's directive in Chevron v. Huson.....

The circuit decision below carefully considered each of the three factors set forth by this Court in Chevron Oil Co. V. Huson, 404 U.S. 97 (1971) in determining whether the facts of this case merited non-retroactive application of this court's rule in Wilson v. Garcia, 105 S.ct. 1938 (1985). The Wilson rule applies a two-year personal-injury statute of limitations to a 1983 claim rather than a six-year contract statute. Goodman v. Lukens Steel, 777 F.2d 113, 118 (3rd Cir. 1985), 42 P.S. 5524. The circuit found that it would be unfair to apply Wilson retroactively to bar Plain- tiff's 1981 claim because Plaintiff had reasonably relied on "crystal-clear" case law of

the Third Circuit, which unanimously held (prior to Goodman), that 1981 claims enjoyed a six-year statute. Al-Khazraji v. St. Francis College, 784 F.2d 505 at _____, (3rd Cir. 1986) citing Davis v. U. S. Steel Suppy, 581 F.2d 335 (3rd Cir. 1978):

Four circuit courts which have done a Chevron analysis have agreed with the Third Circuit that if it would be unfair to shorten a statute of limi- tations by retroactive application, Wilson, must be applied prospectively. Gibson v. U. S., 781 F.2d 1334 (C.A. 9th 1986), Jackson v. City of Bloomfield, 731 F.2d 652 (C.A. 10th 1984), Anton v. Lehpamer, No. 85-2565, (C.A. 7th 1986). Other circuits, after a Chevron analysis, have applied the rule retroactively. There is no conflict among the circuits; each has

analyzed the rules under Chevron to determine whether the rule of Wilson applies retroactively, as did the third Circuit in Smith v. City of Pittsburgh, 764 F.2d 188, 194-196 (C.A. 3rd. 1985). Gates v. Spinks, 771 F.2d 916 (C.A. 5th 1985) (cert. denied _____U.S. _____, 1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (C.LA. 11th 1985) cert denied _____U.S. _____ (1986); Mulligan v. Hazard, 777 F.2d 340, cert denied, 54 USLW 3808 (June 10, 1986).

There is no conflict in the Circuits. If Courts follow the teaching of Chevron V. Huson, the issue of retroactive application of Wilson is easily and fairly resolved.

III. The decisions of the Third Circuit that the individual defendants may be held personally liable is clearly within the scope of the liability imposed for intentional discrimination under Section 1981 and does not conflict with the teachings of Anderson v. Liberty Lobby

It is clear that if the individual members of the Tenure Committee violated Plaintiff's rights, they can be liable individually as well as in official capacities as agents for the employer college. Directors, officers, and employees of corporation may become personally liable when they intentionally cause an infringement of rights protected regardless of whether the corporation may also be held liable. Tillman v. Wheaton-Haven Recreation Association. 517 F.2d 1146 (4th Cir. 1975): Faraca v. Clements, 506 F.2d 956, 959 (5th Cir.) cert. denied 422 U.S. 1006 (1975).

The Circuit's decision reinstated the 1981 causes of action as against individual tenure committee members. It is simply not true that Tenure Committee members have only "limited, non-decision-making roles" in voting to grant tenure. Until Plaintiff receives discovery on the events of his tenure decision, it is premature to suggest that individual defendants be released from liability. The holding of the Circuit Court was correct in this case and was in accord with decisions of other Circuits so holding. It is also in accord with dicta of this court in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors).

## REASONS FOR NOT GRANTING THE WRIT

### IV. The decision of the Third Circuit reversing the order denying discovery of "confidential" tenure materials was correct and in accord with decision of this Court and of other circuits.

The issue here is crystal clear: whether a college tenure committee is exempt from discovery in a Federal Court proceeding to determine e whether its vote was free of the taint of unlawful race discrimination.

Plaintiff's burden in a tenure denial case alleging discrimination is set forth in Kunda v. Muhlenberg College, 463 F.Supp. 294 (E.D.Pa 1978),aff'd 621 F.2d 532, 544 (3d Cir. 1980). The applicant must show (1) membership in a protected class, (2) sufficient professional skills to

qualify for tenure, (3) consideration for and denial of tenure, and (4) that the employer continued to seek other applicants for tenure after denying it to Plaintiff. Once the Plaintiff has made a prima facie case, the burden shifts to the employer to articulate a legitimate, non- discriminatory reason for its decision. The Plaintiff then has the opportunity to show that the employer's reason was pretextual. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, (1978). For a claim raised under 1981, Plaintiff must show that the discrimination was intentional, Washington v. Davis, 426 U.S. 229 (1976.)

Since a non-discriminatory reason for denying tenure is an essential element of the employer's defense,

evidence relating to that reason should be discoverable. Defendant College refused to supply reasons for denying tenure to Plaintiff. The trial court refused to compel discovery, and denied Plaintiff access to virtually every piece of information relating to the reasons for the negative tenure vote:

a. the nature of individual committee member's votes,

b. the reasons for each member's votes,

c. the information available to each member concerning the Plaintiff,

d. the nature of any 'negative' information in the possession of the tenure committee member prior to the vote,

e. whether the member had 'sought out' relevant information on the Plaintiff, as he was obligated to do,

f. how Plaintiff's credentials compared to those of successful tenure applicants,

g. in what particulars Plaintiff had failed to meet the Guidelines for Tenure, which were part of his contract of employment

(see the Motion to Compel Discovery at 143a, setting forth each of these issues in great detail.)

Tenure cases have turned on the issue of whether a Defendant has articulated a legitimate non-discriminatory reason for refusing to tenure an applicant:

1. whether the votes of the committee were unlawfully influenced by national origin or race, Banerjee v. Smith College Board of Trustees, 495 F.Supp. 1148 (1st. Cir. 1982);

2. whether the college lacked objective guidelines for the grant of tenure and whether Defendant's tenure denial was

the result of consideration of unlawful or suspect subjective criteria, Turgeon v. Howard University, 571 F.Supp 679, (D. D. Col. 1983)

3. whether a negative tenure decision was based upon a pretextual reason, and whether Defendant failed to fully and fairly consider the merits of Plaintiff's application for tenure, Kumar v. Board of Trustees of the University of Mass. 566 F.Supp.1299 (D.Mass 1983)

4. whether the standard for appointment of a minority Plaintiff were more stringent than those applied to members of the majority , Turgeon v. Howard University, supra,

5. whether the vote for tenure was adversely influenced by impermissible factors such as Plaintiff's political support of positions contrary to those espoused by his employer, Civitico v. University of New Hampshire, (D.C. N.H.1982, unreported, C80-232L, Aug 19, 1982)

6. whether significant procedural irregularities in tenure procedures had occurred in the processing of the Plaintiff's

application; Kunda v. Muhlenberg; supra, 463 F.Supp. at 310,

7. whether persons with similar qualifications to Plaintiff's were granted tenure, while Plaintiff was denied tenure, Kunda v. Muhlenberg, supra, 463 F.Supp. at 310.

The approach taken by the District Court in restricting discovery in this case virtually forecloses proof of discrimination in university tenure Only if Defendants set forth the reason for denial of tenure can Plaintiff meet his burden of proof that the "non-discriminatory" reasons advanced by Defendants are pretextual. This issue applies equally to Section 1981 and Title VII claims. Gray vs. Bd. Higher Ed. of City of N.Y., 692 F.2d 901, 905 (C.A. 2nd 1983.)

The Federal Rules emphasize liberal and full disclosure of relevant informa-

tion. FRCP 26($b_1$)(1). Rule 26 allows discovery of any material not privileged. This Court has held:

> "In resolving the tensions between the opposed needs for confidentiality vs. disclosure, we are reminded that the discovery rules are to be accorded broad and liberal treatment, particularly where proof of intent is required." Herbert v. Lando, 441 U.S. 153, 170-75 (1979).

Here, Respondent cannot cite a privilege that protects the votes of the tenure committee from disclosure. Dinnan v. Blaubergs, 661 F.2d 426 (5th Cir. 1981).

How can Plaintiff Al Khazraji prove his prima facie case? He has been denied discovery as to each and every one of the seven factors that other courts have held relevant in proving discrimination in the tenure process. He does not know the reasons for denial

of tenure; he has been forbidden access to the data the Committee had in front of it negatively influencing its decision; he does not know whether his union activities were a factor in the negative vote; he cannot learn whether his credentials compared unfavorably to those of white Catholics who received tenure,or in what regards his application was found to be lacking. He cannot even learn the vote of the faculty member known to have made disparaging racial remarks against Arabs, or whether that faculty member's prejudice against Plaintiff's race and origin colored his vote. He cannot measure the College's conduct against its obligations under his contract of employment, and cannot know whether the procedures in the tenure vote also

constituted a breach of his contract of employment by the College's not 'seeking out' material favorable to his tenure.

Since Plaintiff has been denied virtually all discovery, it is not surprising that the district Court granted the Motion for Summary Judgment against Plaintiff. The Circuit Court properly found that the Trial Court abused its discretion in denying Plaintiff discovery as to the reasons for denial of tenure. Its decision is in accord with the policy of this Court as enunciated in Herbert and should not be disturbed.

## CONCLUSION

There is no conflict betweeen the Circuits as to any of the Questions presented by Petitioner. There is no reason for plenary consideration of any question by the Supreme Court.

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